88-1413

Supreme Court, U.S.
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No. _____

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

****

WILLIAM A. FITZGERALD, PETITIONER

V.

DON M. NEWMAN, ACTING
SECRETARY, U.S. DEPARTMENT
OF HEALTH AND HUMAN SERVICES

****

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

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QUESTION PRESENTED

DID THE COURTS BELOW, IN GRANTING SUMMARY JUDGEMENT TO THE DEFENDANT, ADEQUATELY PROTECT THE PETITIONER'S RIGHTS IN THE FEDERAL EMPLOYMENT RACIAL DISCRIMINATION AREA WHEN THEY FAILED TO ADHERE TO U.S. SUPREME COURT STANDARDS AND ALSO FAILED TO INVESTIGATE A TIMELY WARNING THAT IRREGULARITIES IN THE LEGAL SYSTEM MIGHT HAVE ADVERSE IMPACT UPON THE PETITIONER'S CASE?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, William A. FitzGerald, respectfully prays that a writ of certiorari be issued to review the judgement of the United States Court of Appeals for the Fourth Circuit entered on October 6, 1988.

OPINIONS BELOW

The decision by the Court of Appeals is unpublished. A copy of the opinion, FitzGerald v. Secretary, U.S. Department of Health and Human Services, No. 88-2518 (4th Cir., October 6, 1988) is attached as Appendix A, infra. A request for a rehearing was timely filed. It was denied on November 17, 1988 and is attached as Appendix B, infra. The Judgement, Order and Memorandum handed down in FitzGerald v. Secretary, U.S. Department of Health and Human Services, No. S-86-2819 (D. Md., February 12,

1988) (Judge Smalkin) appears as Appendix C, infra. The decision of the Equal Employment Opportunity Commission, FitzGerald v. Department of Health and Human Services; dated September 29, 1987 (Dolores L. Rozzi, Director, Office of Review and Appeals); Appeal No. 01862296; Agency No. ADM378-84, is attached as Appendix D, infra.

JURISDICTION

The jurisdiction of this court is invoked under the authority of Title 28, United States Code, Section 1254(1) (1988) in conjunction with Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. Sec. 2000e-16. Employment by Federal Government.

STATUTES INVOLVED

Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. Sec. 2000(e)-16 p. 918 Employment by Federal Government:

(a) All personnel actions affecting employees or applicants for employment...in executive agencies...and in those units of the legislative and judicial branches of the Federal Government having positions in the competitive service, and in the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

Rule 56(c) Federal Rules of Civil Procedure:

[S]ummary judgement shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any materal fact and that the moving party is entitled to judgement as a matter of law.

STATEMENT OF THE CASE

The petitioner, Dr. William A. FitzGerald, is a black sociologist employed at the National Institute on Drug Abuse (NIDA). He brought action in the United States District Court for the District of Maryland in which he alleged employment discrimination on the basis of race, and reprisal for filing an employment discrimination charge under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C.A. Sec.2000e-16 p. 918 Employment by Federal Government.

The complaint alleged that the Defendant, Secretary of the Department of Health and Human Services, discriminated against petitioner on the basis of race as follows: (1) attempting to deny him the right to apply for a research position for which he was qualified; (2) wrongfully attempting to keep him from "bumping" another employee during the 1981 Government-wide reduction-in-force (RIF);

(3) preventing him from performing his scheduled duties and receiving the experience that he would have gained as a researcher on the "Polish Study," (4) inaccurately and illegally appraising his work performance; and (5) denying him the opportunity for promotion. The complaint further alleged that as a result of his filing a race charge alleging discrimination and reprisal in April, 1984, he was subjected to retaliatory treatment in the form of illegal evaluations, harassment and a pattern of being given "make work."

In support of these claims, the petitioner presented to the District Court documentary evidence which established the following: He became a Program Analyst in the Office of Program Development and Analysis in NIDA, a part of the Alcohol, Drug Abuse and Mental Health Administration (ADAMHA), in the Department of Health and Human Services (DHHS) in March 1980. During his first year with NIDA, petitioner was considered a very fast learner

and was recommended for promotion from GS-12 to GS-13.

Pursuant to the December 12, 1981 RIF, petitioner was notified by the Agency that a higher ranked female was entitled to his position. In response, petitioner identified a Research Sociologist, GS-184-12 position he was qualified to perform in the Laboratory of Socio-environmental Studies (LSES) in the Intramural Research Program (IRP) of the National Institute of Mental Health (NIMH). The encumbent of this position was Dr. Joanne Miller, a white female, who was a temporary employee, and therefore could be bumped.

Upon petitioner's applying for Dr. Miller's position, Ms. Nordstrom, Director of ADAMHA Personnel, denied him the position in writing, claiming he was not qualified. The basis of her assertion was that the position required experience in computer technology, <u>including computer programming.</u> Petitioner discovered that computer programming was not a

requirement for the job nor was this barrier erected for whites who applied for the position.

Further, Mrs. Nordstrom also stated in writing that Dr. Miller was a career conditional employee instead of a Group III temporary employee who would have been much easier to bump. Petitioner discovered that this assertion about Dr. Miller's employment record was equally false.

Even after Petitioner brought these considerations to Ms. Nordstrom's attention, she continued to claim otherwise. Only when petitioner raised the issue of racial discrimination and took his case to investigative reporters at WJLA-TV, Channel 7, did Ms. Nordstrom suddenly re-evaluate his credentials, find him highly qualified, and offer him the position to which he was legally entitled.

Upon his arrival at the LSES, officials there subjected Petitioner to severe harassment

designed to force him to leave the job. Dr. Kohn, the Lab Chief, told petitioner that he was unqualified for the position and threatened him with low performance ratings which he promised would destroy his career. He advised petitioner to depart the Lab before he was forced to undergo testing, i.e., being put on the job, allowed to fail, and then being fired. (See Kohn's deposition at 72)

Standing his ground, petitioner refused to voluntarily relinquish his position. Hence, Dr. Miller, the white sociologist holding the job in question was supposedly "bumped" and slated for separation from the Federal Service.

Dr. Kohn, in turn, wrote a scathing memorandum to Ms. Nordstrom which denounced petitioner as being unfit to serve as even a journeyman researcher despite his obvious credentials. Dr. Kohn even had the audacity to assert that only four or five people in the entire world were capable of handling the complexities of the Polish Study. This remark

is very significant. Petitioner is, after all, the only black civil service scientist ever employed in the LSES.

High ranking ADAMHA officials held a closed meeting with Dr. Kohn on January 5, 1982. Present were Ms. Nordstrom, her superior, Mr. Joseph Leone, the third highest ranking person at ADAMHA, and Mrs. Hazel Rea, representing Dr. Frederick Goodwin who was awaiting official appointment as Director of the IRP. While petitioner was never informed of the secret deliberations conducted therein, the meeting resulted in the creation of a new position at LSES; secret removal of petitioner from the position assigned to him in the RIF, (despite prohibition under RIF rule, 351.603, op. cit., against removing him before the end of three months), and his transfer to this new position. It was petitioner's erroneous understanding that he was still in the same position as before but in a new slot which had been recently vacated by a retiree.

On January 15, 1982, Dr. Kohn informed petitioner that Dr. Miller's termination notice had been cancelled. She, instead, would be his supervisor and would provide him training on the Polish Study. He later was eased off the Polish Study altogether.

Petitioner, however, never agreed to accept a position as a trainee (See appellant's Informal Brief to the Court of Appeals, Fourth Circuit, Attachment 12). He, instead, repeatedly asked to begin his legally assigned job. Dr. Miller's resignation four months later left an opening on the Polish Study which petitioner still was not permitted to fill. The petitioner remained without job or assignment for 22 months.

As Dr. Kohn never made any attempt to charge petitioner formally with incompetence or to remove him legally under RIF regulations designed for that purpose, it was obvious that Dr. Kohn was afraid to test petitioner's competence. In fact, although Dr. Kohn was

petitioner's direct supervisor, he never tested him or did any work at all with him during his entire stay in the Lab. Petitioner's term appointment expired on February 23, 1984, and he was reassigned to NIDA. Petitioner then filed a formal complaint of racial discrimination and retaliation against ADAMHA. In March of 1984, the agency accepted the complaint for investigation.

During this same period, petitioner noticed that he was being treated differently at NIDA than before the RIF. Prior to his assignment at LSES and his filing of his complaint, he had been well-regarded by his peers and even recommended for a promotion. He suddenly was faced again with unlawful performance appraisals, "make-work," harassment and insults. Ms. Becker, petitioner's immediate supervisor, began to withhold information which had a vital bearing on how well he performed his job. She also gave other members of the staff disproportionate amounts

of work while claiming there was a lack of work for petitioner. Other members of the staff generally ignored petitioner, knowing he was a marked man. However, once, within petitioner's hearing, Ms Becker intimated to others that an unnamed member of her office staff was "less than dirt and was merely being tolerated." Petitioner eventually traveled to the HHS building and complained about this treatment directly to officials at the Secretary's Office, the Inspector General's Office, and at the Assistant Secretary For Health's Office under the alleged DHHS Open Door Policy. This created consternation at NIDA and the harassment became more subtle.

Despite all of the above, DHHS ruled that petitioner had not been discriminated against because of race/color. Petitioner appealed this decision to the EEOC on June 17, 1986 and then, at the appropriate time, filed in Federal District Court in Baltimore. The EEOC took over 15 months to respond but on September 29,

1987, it found that ADAMHA was not in compliance with Title VII and EEO regulations (29 C.F.R. Sections 1613.212, .214, and 29 C.F.R. Section 1613.216). Thus the Agency's no discrimination decision was vacated and the case remanded for investigation under the appropriate regulations. ADAMHA also was forced to reinstate the reprisal/retaliation part of petitioner's complaint which it had removed without cause or explanation.

About four months later, the defendant moved in District Court for summary judgement sans oral argument. Before the court could make a judgement, however, petitioner acrimoniously discharged his lead attorney due to evidence which seemed to indicate that his counsel was deliberately and systematically undermining his case. Petitioner immediately notified Judge Smalkin of this fact by certified letter with attachments. In the first attachment to this letter, which is petitioner's letter to his counsel terminating

counsel's services, petitioner stated:

> It is clear to me what is going on. It is my personal opinion that you've been trying to scuttle this case for a long time. That's why I decided to bring in someone else to handle the last two depositions.

The Court, however, brushed aside any investigation of these charges and pushed through a summary judgement ruling in favor of the government, despite the obvious consequences to the unprotected rights of the petitioner. The petitioner, having become financially depleted because of his lawyer, filed a pro se appeal in the U.S. Court of Appeals For the Fourth Circuit. The District Court decision was upheld by the Appellate Court and a request for a rehearing was denied.

IRREGULARITIES IN THE LEGAL SYSTEM

Subsequent to filing a response to Defendant's Request For Summary Judgement, petitioner was forced to discharge his counsel because of his very strange behavior and a feeling on the part of the petitioner that counsel was attempting to undermine his case. For example, counsel allowed petitioner to be deposed without preparation of any kind while advising him to waive reading and signing his deposition (See FitzGerald deposition at 257).

Another questionable act by this same attorney included his apparent efforts to distort or omit evidence in his briefs that was favorable to petitioner. For example, counsel always asked Petitioner to try his hand at writing the first draft of every brief. The purpose, obviously, was to find out how much petitioner knew about the law and where he would be most vulnerable. In one instance, petitioner included a vitally important

memorandum by Mrs. Hazel Rea which was laden with the kind of demonstrable deception and falsehoods that was practiced by high officials in this case. Counsel prompted excised it from the brief. (See appellant's Informal Brief to the U.S. Circuit Court of Appeals for the Fourth Circuit at 9-10 to understand how vital this memorandum is to petitioner's case). Counsel also insisted upon inserting into the brief the highly questionable claim that petitioner was more qualified than Dr. Miller despite a warning from petitioner that such statements would make the brief seem frivolous and easy to discredit. Counsel seemed determinined to make the McDonnell Douglas four-step discrimination proof scheme central to the case even though two of the four elements obviously did not fit. Counsel also concealed vital information from the petitioner until it was too late to win a point of law (see Apprendix F); arbitrarily dismissed petitioner's case before the EEOC (see letter

bearing on this, Appendix G); and possibly was implicated in altering testimonial transcripts and/or erasing audiotapes made of Dr. Kohn's testimony by co-counsel who had been called in because of petitioner's distrust of his lead counsel.

Let us assume for the sake of discussion that the government, very apprehensive over the possibility of losing a case which might have far-reaching ramifications for its "lily white" scientific research, sought an ally in the petitioner's camp to sabotage his chances. (This is not as far-fetched as it may seem since the petitioner turned over to the EEOC documentary evidence indicating that EEO offices up and down the line acted in concert to impede petitioner's EEO case (See Appendix H)). Consider further that the government's main witness, a Dr. X, had been skillfully maneuvered into damaging admissions during his deposition by a new co-counsel who had been specifically hired for this purpose. The

co-counsel also had audiotaped Dr. X's testimony at the request of petitioner. Obviously, the government would then have to prevent those tapes from falling into the hands of the petitioner. To do this, three people had to cooperate: petitioner's lead counsel; the co-counsel with the tapes; and the reporter who recorded the testimony. Whether petitioner knew the transcripts had been altered was of no consequence unless he had the proof. No one seems to know what actually happened but the fact remains that the petitioner was well aware that Dr. Kohn's transcripts differed from the testimony he had heard and that the four audiotapes "accidentally" had been erased.

In order to assure victory, the government would have had to follow two other strategies: (1) submit a faulty petitioner's brief to the District Court and (2) deplete his financial resources so he could not possibly appeal a losing decision. Whether or not this happened is unclear but petitioner's brief obviously was

strangely incompetent and his counsel did drain away the last of his $20,000 in life savings even before charging petitioner $5,000 for the 25-page brief as well as reinstating an already cancelled $500 bill from the court reporter. (See letter relating to the former in Appendix I and letters relating to the latter in Appendix J). In desperation, Petitioner dismissed his lead counsel and sent a copy of the dismissal letter to Judge Smalkin together with a request for badly needed advice (see appendix E).

In regard to the loyalty of the petitioner's lead counsel, nothing could be more inimical to trust than unaccountable acts of omission on his part. Any attorney just out of law school knows that to permit the defendant's affidavits to go uncontested is a sure way to lose upon a summary judgement. (See 28 U.S.C.A. Federal Rules of Civil Procedure. Rule 56, note 683). Petitioner's counsel did exactly that with respect to the Becker retaliation complaint declaration. Even

more indicative of questionable loyalty is the failure of counsel to introduce into the case the retaliation/reprisal charges the EEOC had recently restored against ADAMHA and the LSES. Even under-schooled attorneys know that retaliation/reprisal charges are infinitely easier to win where -- as in this case -- the three elements required by the McDonnell Douglas proof scheme were already in place. Ross v. Communications Satellite Corp., 759 F.2d 355, 365 (4th Cir. 1985), citing McDonnell Douglas Corp v. Green, 411 U.S. 792 (1972).

DR KOHN -- A SELF-IMPEACHED WITNESS

Rule 56(c) of the Federal Rules of Civil Procedure states:

> [Summary judgement] shall be rendered forthwith if the pleading, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgement as a matter of law.

Title VII imposes upon Rule 56 a further condition. Plaintiff must present a prima facie case and once presented, the burden shifts to the defendant to successfully rebut it through the introduction of admissible evidence. The answers provided must be legally sufficient to justify judgement for defendant. Texas Dept. of Community Affairs v Burdine. 450 U.S. 248, (1981).

The District Court ruled in the instant case that:

> Defendant has offered legitimate, non-discriminitory reasons for the action relating to the RIF, and the plaintiff has submitted no evidence whatsoever that the proffered reasons are merely a pretext for racial discrimination. Appendix C, at 12.

The Court erred in awarding summary judgement to the defendant for several reasons.

The District Court in its decision as set forth in its memorandum never ruled that petitioner had failed to present a prima facie case, thus acknowledging by implication that he had.

The Court, at page 12 of it's memorandum, gave enormous weight to Dr. Melvin Kohn's virtually uncorrobrated opinion that petitioner was not qualified to do Dr. Miller's job. Dr. Kohn says in pertinent part:

> Let me tell you why I was so certain he couldn't possibly do it. We are dealing with very advanced statistical techniques. Joanne Miller had gone to graduate school at the department of sociology in the country that is most reknowned [sic] for training people in quantitiative data analysis. She had come to our laboratory and had a five year post doctoral fellowship and had a great deal of training and [a] huge amount of experience...
>
> Fitz had gone to a graduate school which does not pride itself on training people in quantitative data analysis. It is simply not its forte...
>
> He wasn't prepared to start to do the kinds of things that Joanne did because he didn't have in his background the kinds of things that Joanne had had in graduate

> school no less the five years post doctoral...And when he said I can do this in three months, all it meant was he didn't know what the this was. He couldn't possibly do it...He did not have the training or experience.

(Kohn Deposition Transcript at 57-58).

The first thing petitioner's lawyer should have done was to impeach Dr. Kohn as a witness using available evidence. For example, Kohn's statement above fails to rebut because it was subjective and the U.S. Supreme Court ruled that subjective criteria carried little weight in rebutting charges of discrimination. See McDonnell Douglas, 411 U.S. at 798.

Dr. Kohn also was given to making incredible statements. In Attachment 4 to plaintiff's Opposition to Summary Judgement, Dr. Kohn's memorandum to ADAMHA personnel declaring that only five people in the world could perform Dr. Miller's job is included. Dr. Kohn would find little support for such an incredible statement. Incredible evidence, it

was ruled in Hales v. First Appalachian Corp., 494 F. Supp. 330 (N.D. Ala.1980), may be disregarded by the courts. Dr. Kohn also has a history of inconsistencies or exaggerations. In his deposition (Kohn at 72), he admitted he advised petitioner that someone in personnel had told him to put petitioner on the job, let him fail and then fire him. When confronted, he was unable to name the person. Kohn wrote on petitioner's first performance plan "Dr. FitzGerald has begun to do statistical analyses in conjunction with Dr. Miller and me (see Defendant's Motion for Summary Judgement, Attachment Q)," but later, in his deposition at 224-5, he admitted that he had never worked with petitioner. Most indicative of Dr. Kohn's propensity toward exaggeration is his appraisal of petitioner's term paper which he characterized as "Appalling...incredibly amaturish, not even a good undergraduate term paper." (See Petitioner's Informal Brief to the Appeals Court, Attachment 33). This same paper

was judged by a former, more prestigious, member of Kohn's LSES staff as, "Nice job." Id, Attachment 34.

Except for Dr. Miller, who was the only person in the LSES with whom petitioner ever worked, and against whom she held a burning resentment for having taken her job, Dr. Kohn's testimony was totally uncorroborated. Even Dr. Miller shied away from the incredible statements Dr. Kohn was making. On the other hand, petitioner was supported on the qualifications issue by Mrs. Pauline Nordstrom and by a whole ADAMHA RIF Review committee which judged him qualified. (See Nordstrom deposition at 14).

Finally, neither Dr. Kohn nor Dr. Miller knew the LISREL program before coming into the laboratory. They learned the program while in the lab by being instructed in it by a gentleman from the University of Michigan who was hired to teach them (See plaintiff's deposition at 100).

THE COURTS BELOW IGNORED RIF REGULATIONS AND INADVERTENTLY AIDED THE GOVERNMENT'S POSITION

Under RIF regulation, 5 CFR Section 351.702, petitioner needed to be only minimally qualified to be eligible for Dr. Miller's job. Making invidious comparisons and measuring him against Dr. Miller has no bearing on the case. Further, under RIF regulation, 5 CFR Section 351.603 (see Kohn deposition at 128), petitioner was entitled to perform Dr. Miller's job for 90 days to demonstrate competence. If he failed to display minimum competence 90 days after starting the job, he was susceptible to being legally removed. Interestingly, Dr. Kohn stated in the notes he took at a high level management meeting called by Mrs. Nordstrom on January 5, 1982 to determine petitioner's fate, that petitioner was characterized as a litigious person of whom one should beware. (See Kohn, supra, at 139.) If this is a true account, would these officials have violated so many Federal regulations for over two years

with the Sword of Damocles hanging over them or would they have rid themselves legally of this menace in a mere 90 days? (See Kohn's deposition at 138-9). Even if the law, as most people hold, is unamenable to logic, a series of facts can be so cogent that they force acceptance. Dr. Kohn insists that he did not put petitioner to the test because he wanted to protect petitioner from himself. Incompetency does not work this way. An incompetent employee is afraid to be tested, especially when he can survive on the job simply by remaining silent. Petitioner continually demanded to be tested, as was his right under the law (see Kohn deposition at 57; 75; 131). The only logical conclusion one can draw is that Dr. Kohn et al were fairly certain that petitioner could perform and were dead set against giving him that chance.

One of petitioner's central agruments was that sub-agency units are barred by RIF regulations from using the qualification issue

as a defense. (Plaintiff's brief at 20.) These regulations spell out that ADAMHA Personnel alone had the authority of job placement. 46 C.F.R. Sec. 351.603 (1981) Had the court and the government not ignored this argument, the government's case would have collapsed. For example, an admission would have strengthened petitioner's prima facie case; a denial would have established a material fact in dispute.

Likewise petitioner in his brief (plaintiff at 19-21) mounted a charge of pretext which was ignored by the court and defendant. The government had argued that it removed petitioner from the Polish Study because of its fear that his incompetency would delay the project (See Kohn deposition at 127). This, of course, was mere pretext masking discrimination because the government could have placed both Dr. Miller and petitioner on the project simultaneously (but operating independently) during the 90-day grace period given to new RIF incumbents. This

would have displayed petitioner's individual capacity and also would have prevented project delay (Plaintiff's brief at 20). Once again both the District Court and the government ignored this central allegation. To have addressed it would have established a material fact in dispute.

For reasons unknown, both the Court and the government remained silent on a series of allegations by petitioner that Federal RIF and other regulations had been violated (See plaintiff's brief at 19-21; Attachmnent 21; Attachment 1; and appellant's Informal Brief at 2; 8-9). Material facts in dispute would have emerged from each one.

The District Court was particularly inattentive in citing parts of Petitioner's case out of context which, of course, changed the meaning considerably. A major example is footnote 2 at 3 which says: "As it turned out, computer programming was not a requirement of the job, but familiarity with the computer

language LISREL was required. The relevance of this fact will be discussed post." The footnote refers to a statement in the text of the Court's Memorandum which says: "By letter dated December 1, 1981, Ms. Nordstrum, Director of ADAMHA Personnel, indicated to plaintiff that he was qualified for a Research Sociologist position, GS-12, but that the position for which he applied required knowledge of computer technology at a level greater than his records indicated that plaintiff had." Unrevealed here is the fact that Mrs. Nordstrom specifically demanded of petitioner evidence of training in computer programming which was not demanded of white applicants. Also not mentioned is that RIF regulations granted petitioner 90 days to display minimum proficiency in LISREL after being placed on the Polish Study. Since petitioner never was allowed to perform his assigned duties, he, in theory, still has 90 days to learn LISREL.

Similarly, the Court stated at 4:

> Dr. Kohn then allegedly said that someone in personnel had told him to put plaintiff in the job, let him fail, and fire him. Plaintiff replied that, if given the chance to fail, plaintiff would in fact succeed, not fail.

The above is not a factual account of what really transpired. In reality, petitioner responded to Dr. Kohn's threat in this manner:

> [That's] another good idea because when you give me the chance to fail, you also give me the chance to succeed and I welcome that opportunity. (See plaintiff's deposition at 108 and Dr. Kohn's deposition at 75).

DISTRICT COURT WAS MISINFORMED ABOUT CASE

That the District Court was woefully misinformed about vital aspects of the law governing petitioner's case is a fact that accrued to the government's advantage. The court should have known that the following were totally untrue but stated them anyway:

> (i) In May 1986, the EEOC, in a final decision found no racial discrimination (Memorandum at 8; rebutted by Appendix D; (ii) knowledge of LISREL was needed by petitioner for him to begin his assigned duties and his lack of this skill was sufficient reason to prevent him from starting his job (memorandum at 14;

rebutted by 5 CFR Sec 351.702. Also see plaintiff's deposition at 98). (iii) plaintiff's performance appraisals were "completely justified" (Memorandum at 14; rebutted by appellant's Informal Brief at 8-9 and plaintiff's Brief at 22-3); (iv) Ms. Becker's declaration was admissible evidence (memorandum, footnote at 17; rebutted by 28 U.S.C. Sec. 1746, such a declaration requires a date); (v) plaintiff had not taken the prerquisites for the LISREL course (Memorandum at 6; rebutted by plaintiff's deposition at 82), and (vi) various facially untrue implications that space does not permit petitioner to pursue such as the court permitting defendant to avoid adhering to RIF placement standards required by law while uniformly adhering to them when dealing with white employees.

DISTRICT COURT ADMITTED THAT A MATERIAL FACT IN DISPUTE DID EXIST

The District Court, on page 7 of its memorandum, stated as follows:

> Plaintiff requested to be allowed to work on the Polish Study, but Dr. Kohn and Dr. Miller suggested that plaintiff begin his laboratory training on a project that was just beginning so that he could learn the appropriate statistical techniques.
>
> Dr. Kohn and Dr. Miller considered the Polish Study to be too far along to be of much help in training plaintiff. Plaintiff disputes that his position was to be that of a trainee.

Quite obviously, the above material fact

is in dispute as the Court, itself, admits and this is highly significant. Dr. Kohn contends that petitioner agreed to be a trainee and it was because of this alleged acceptance on his part that Dr. Kohn consigned him to the role of trainee and moved him off the Polish Study. Dr. Kohn, however, could offer no evidence in support of his contention. Pettioner, on the other hand, has produced irrefutable documentary evidence showing that he rejected trainee status and wanted to perform his legally assigned job on the Polish Study consistent with his RIF mandate. (See apellant's Informal Brief, Attachment 12).

BY NOT HOLDING THE MANDATORY ORAL ARGUMENT, THE DISTRICT COURT FAILED TO COMPLY WITH SUPREME COURT RULINGS

In McDonnell Douglas Corp v. Green, 411 U.S. 793 (1973), the Supreme Court set out a three-step sequence for establishing "the proper order and nature of proof in actions under Title VII of the Civil Rights Act of

1964," as amended. First the petitioner must establish a prima facie case. Second, the respondent must offer legitimate, nondiscriminatory reasons for his actions against petitioner and, Third, petitioner must be given "a full and fair opportunity to demonstrate by competent evidence that the presumptive valid reasons for his rejection were, in fact, a coverup for a racially discriminatory decision." (Supra at 804-805).

The Court ruled that sequencing was of vital importance. The same applies in petitioner's case. After petitioner established a prima facie case at the District Court level, respondent had to rebut it. Once, however, the petitioner learned the respondent's purported reasons for his action, he then had to have been given an opportunity to show that these reasons were mere pretext for unlawful discrimination. Obviously, petitioner could not speculate or guess as to the nature of these reasons until after they

were fully presented. Sequencing thus engrafted upon Rule 56 and Local Rule 6, D.Md as cited at 2 in District Court's Memorandum, the necessity of holding oral argument so that petitioner might engage in showing pretext by the respondent. The District Court, therefore, was in error in failing to hold oral argument.

AN UNREBUTTED PRIMA FACE CASE IS A MATERIAL FACT IN DISPUTE

Defendant, by allowing so much evidence to go uncontested hardly could be said to have rebutted petitioner's prima facie case. Thus petitioner's unrebutted prima facie case was, in itself, a material fact in dispute and defendant was not entitled to summary judgement as a matter of law. In Lowe v. City of Monrovia, 775 F. 2nd 998 (9th Cir. 1985). modified, 784 F.2d 1407 (9the Cir. 1986), the Ninth Circuit stated that it is inappropriate to award summary judgement if a plaintiff has established a prima facie case:

[W]hen a plaintiff has established a prima

facie inference of disparate treatment or circumstantial evidence of discriminatory intent, he will necessarily have raised a genuine issue of material fact with respect to the legitimacy or bona fides of the employer's articulated reason for its employment decision.

REASONS FOR GRANTING THIS PETITION

Petitioner's case is unique. There exists no precedent or court decision in the literature relating to a black U.S. civil servant who was legally assigned to a job during a RIF, then illegally removed from that job for alleged incompetency, despite never having been permitted to perform that job for even a single second.

While this Court has established various proof schemes by which aggrieved Federal employees charging racial discrimination may vindicate their rights under Title VII of the Civil Rights Act of 1964, as amended, none of these tests apply to petitioner's case. Petitioner, after all, was a lone black who claimed rights under RIF regulations in the

"white preserve" of scientific research where no other civil service black scientists had ever been permitted whatever their qualifications. It is well-known that scientific research, through circumventions like those elucidated above, is almost entirely closed to blacks.

Because of the uniqueness of petitioner's case, and the lack of Supreme Court teachings related to it, the courts below are free to engage in creative solutions which sometimes deviate from Congressional intent.

This case underscores emphatically the need for specific guidance concerning the standards for an award of summary judgement. The role of Rule 56 in cases such as these has become unclear, reguiring amplication by this Court. For example, the credibility of Dr. Kohn's assertions that petitioner was not qualified to hold the position to which he was assigned despite his having been certified as qualified by a special RIF committee empowered

to make such decisions, flies in the face of documentary evidence, the RIF regulations, and standard RIF procedures as they apply to white employees. Petitioner's charges concerning these facts certainly precluded an award of summary judgement.

Additionally, there has been great conflict at the Circuit Court level over Rule 56. Some courts, such as the Fourth Circuit, hold that summary judgement may be awarded despite evidence sufficient enough to establish a prima facie case. Grigsby v. Reynolds Metal Co., 821 F.2d 590 (11th Cir. 1987); Carey v. United States Postal Service, 812 F.2d 621 (1st Cir. 1987); Dea v. Cook, 810 F.2d 857 (5th Cir. 1986) and the present case (4th Circuit, 1988). Other circuits restrict summary judgement when a prima facie case is established. City of Monrovia, supra:

> Once a prima facie case is established either by the introduction of actual evidence or reliance on the McDonnell-Douglas presumption, summary judgement for the defendant will ordinarily not be appropriate on any ground relating to the merits because the purpose of a Title VII

dispute is the elusive factual question of intentional discrimination...Lowe v. City of Monrovia, Supra, 775 F.2d at 998. See also Williams v. Edward Appffels Coffee Co., 792 F.2d 1482, 1486 (9th Cir. 1986).

The inconsistencies among the Federal courts as well as the loopholes created by the interaction of Title VII with Rule 56 merits the attention of this Court.

CONCLUSION

Based upon the forgoing arguments, cases and authorities, petitioner respectfully prays that this Court issue a writ of certiorari to the Fourth Circuit Court of Appeals.

Dated: 27th Day of February 1989.

William A. FitzGerald

Petitioner Pro Se

PROOF OF SERVICE

It is hereby certified that the original and 39 true copies of this Petition For writ of certiorari were hand-carried by the Petitioner to Mr. J.F. Spaniol, Jr., Clerk of the U.S. Supreme Court, at One First Street, N.E.,; Washington, D.C. 20543; and that three true copies were mailed first class mail, postage prepaid, to the Solicitor General; Department of Justice, Room 5614; Washington, D.C. 20530.

This 27th Day of February 1989.

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